Society In Transition I: A Broader Congressional Agenda for Equal Employment—The Peace Dividend, Leapfrogging, and Other Matters

Alfred W. Blumrosen†

I. The Institutionalization of the Civil Rights Agenda

In the early 1940s, the NAACP devised a legislative agenda that addressed the most pressing concerns of black Americans: lynching, segregation, debt peonage, voting rights, criminal justice, equitable funding for public education, equal employment opportunities, and equal access to union membership.[1] In the last fifty years, this civil rights program has generated a "Civil Rights Establishment"[2] that now embraces Latinos, women, the aged, and the disabled, and includes government officials concerned with minority and women's issues and an impressive array of professional and academic talent.[3]

The movement has helped pass legislation that addressed many of the concerns embodied in the early civil rights strategy and that

† Thomas A. Cowan Professor of Law, Rutgers, The State University of New Jersey. B.A. 1950, J.D. 1953, University of Michigan. Professor Blumrosen has advised the Equal Opportunity Employment Commission, the Department of Labor, the Department of Justice, federal, state, and local governments, and employers, unions, and individual workers on equal employment matters. He served as counsel to the NAACP in NAACP v. Meese and on the amicus brief in Wards Cove Packing Co. v. Atonio. In a forthcoming article, *Society in Transition II: Price Waterhouse and the Individual Employment Discrimination Case*, 42 RUTGERS L. REV.—(summer, 1990), Professor Blumrosen will consider how changes in the past quarter century have affected one type of employment discrimination claim.

1. G. MRYDAL, THE AMERICAN DILEMMA 820 (1944).

2. In light of my views in this paper, I should note that I consider myself part of this Establishment. My involvement in the traditional civil rights agenda began in the 1960s with a critical study of the New Jersey Division on Civil Rights. It included work with the EEOC, OFCCP, and the Civil Rights Division of the Justice Department. In the 1970s, I returned to the EEOC, and in the 1980s, I testified and litigated against the Reagan Administration's civil rights policies.

3. *See* summaries of academic work in A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (G. Jaynes & R. Williams, Jr., eds. 1989) [hereinafter COMMON DESTINY], and the review of the civil rights agenda in THE CITIZENS' COMMISSION ON CIVIL RIGHTS, ONE NATION INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990'S (R. Govan & W. Taylor, eds. 1989) [hereinafter ONE NATION]. *See also Papers and Proceedings of the Second Decennial Rutgers Law School Conference on the Civil Rights Act of 1964*, 37 RUTGERS L. REV. 667-1138 (1985).

have improved opportunities for minorities.[4] The Civil Rights Act of 1964, for example, prohibited discrimination in employment, education, public accommodations, voting, and federally funded programs. Legislation in the 1970s and 1980s overruled unfavorable Supreme Court decisions.[5] Affirmative action continued during the Reagan years despite the Administration's objections.[6] The movement has also helped craft legislation currently before Congress designed to overturn recent restrictive Supreme Court decisions.[7]

Today, however, the civil rights establishment risks being confined by the successes of its past. Just as military leaders are often accused of fighting the last war, so are we all influenced by principles and perspectives forged in earlier contexts.[8] The movement today continues to implement policies devised in the 1940s to address conditions that plagued the 1930s. Improved opportunities for minorities and women, as well as changed demographic and employment patterns, make it unlikely that the traditional agenda will continue to create opportunities for historically disadvantaged groups. Today's civil rights movement thus risks being "blindsided"—overtaken by events beyond its traditional agenda.[9]

---

4. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat 602; Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

The above legislation implemented a program outlined in 1947 by President Truman's Committee on Civil Rights. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS (1947). The report discussed safety and security (lynching, police brutality and administration of justice), citizenship (voting, poll tax, military service), freedom of conscience, and equality of opportunity (employment, education, housing, health services, public services and accommodations).

5. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978); Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

6. *See* Table I, *infra* at page 261.

7. The proposed Civil Rights Act of 1990, H.R. 4000 and S.2104, 101st Cong., 2d Sess., 136 CONG. REC. 364 (1990) would overturn several Supreme Court decisions of the 1988 term that significantly narrowed the scope of the civil rights laws. For a summary of these decisions and their implications, see Blumrosen, *The 1989 Supreme Court Rulings Concerning Employment Discrimination and Affirmative Action: A Minefield for Employers and a Goldmine for Their Lawyers*, 15 EMPLOYEE REL. L.J. 175 (1989); Ralston, *Court vs. Congress: Judicial Interpretation of the Civil Rights Acts and Congressional Response*, 8 YALE L. & POL'Y REV. 205 (1990).

8. In the 1930s, for example, French military leaders ignored developments that made the Maginot line obsolete, and Winston Churchill underestimated the capacity of air power to control the sea, *see* W. MANCHESTER, THE LAST LION: WILLIAM SPENCER CHURCHILL ALONE: 1932-1940 (1988); in the 1860s, U.S. Civil War generals failed to appreciate the tactical significance of the rifled barrel and repeat firing weapons, *see* J. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 472-77 (1989).

9. Concern about limitations in the traditional civil rights agenda is not new. As early as 1967, the U.S. Civil Rights Commission sought to analyze proposed federal

This Article argues that expanding minority and female employment opportunity may depend on expanding the traditional agenda.[10] Part II analyzes the statistical impact of the 1960s equal employment opportunity laws and suggests that structural conditions beyond the traditional agenda have deprived the laws of their expected impact. Although the equal opportunity laws have succeeded in improving occupational opportunities for minorities, they have failed, because of changes in demographic patterns and in the structure of employment, to reduce wage disparities and relative unemployment rates. Part III identifies several areas outside the traditional agenda that greatly influence minority and female opportunity and that the civil rights community should address. The final part suggests a simple mechanism for alerting Congress to the civil rights implications of issues that do not fall within the traditional agenda.

II. Limitations of the Traditional Agenda

In 1964, those concerned with identifying, legislating, and implementing anti-discrimination laws used three indicators to measure race-based employment discrimination: relative occupational distribution, relative wage levels, and relative unemployment rates of minority and white workers.[11] Proponents of the Civil Rights Act of 1964 believed that these three indicators were correlated with one another; they thus drafted legislation that mandated fair recruiting, hiring, and promotion. This legislation was expected to increase

---

legislation that might adversely affect minorities and women but did not fit within traditional civil rights concerns. This effort was rebuffed by the Office of Management and Budget. U.S. COMMISSION ON CIVIL RIGHTS, 7 THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, TO PRESERVE, PROTECT AND DEFEND THE CONSTITUTION 113-123 (1977). In 1985, I suggested that affirmative action be expanded to address new social and economic conditions, but this proposal also met with resounding silence. *See* Blumrosen, *Rethinking the Civil Rights Agenda: Impressions of the Rutgers Law School Conference*, 37 RUTGERS L. REV. 1117, 1129-30 (1985). More recently, a Citizens Commission of former federal officials, a former general counsel of the Equal Employment Opportunity Commission, and the National Urban League have suggested approaches that go beyond the traditional civil rights agenda. *See* Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation and Organization*, 38 CATH. U.L. REV. 795 (1989); ONE NATION, *supra* note 3, at 40-42; Henderson, *Budget and Tax Strategy: Implications for Blacks*, in NATIONAL URBAN LEAGUE, THE STATE OF BLACK AMERICA 1990 53 (J. Dewart, ed. 1990).

10. Although this paper focuses on the race and national origin component of the civil rights movement, women's issues are of course inextricably intertwined with questions of discrimination. Some aspects of this connection will be noted in part III.

11. *See, e.g.*, EEOC, The Many Faces of Job Discrimination, A Report on Job Patterns for Minorities and Women in Private Industry—1966, *reprinted in* A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 102-37 (1971). *See also id.* at 218, 271-92, *and* Blumrosen, *Quotas, Common Sense and Law In Labor Relations*, 27 RUTGERS L. REV. 675, 695-6 (1974).

minority job opportunities and thus to reduce unemployment and improve wages. Senator Hubert H. Humphrey, opening the substantive debate on the Civil Rights Act of 1964, characterized discrimination against Blacks as the cause of their high unemployment rate, confinement to low skilled jobs, and lower earnings. He explained that "[t]he crux of the program is to open employment opportunity for Negroes in occupations which have been traditionally closed to them. This requires both an end to the discrimination which now prevails and an upgrading of Negro occupational skills through education and training."[12] Humphrey and other civil rights supporters expected that as opportunities for Blacks opened in the primary labor market, relative employment and income disparities between minorities and Whites would diminish.

The 1964 Act did improve minority opportunities.[13] In 1972, Blacks constituted 9.5% of all employed workers. Of the 35,189,000 net increase in employees between 1972 and 1989, Blacks accounted for 3,856,000, or 11%. As a result, Blacks were nearly 10% of the total labor force in 1989, a proportional increase of almost 600,000 workers. The success of the Act can be seen most clearly in the improvement in the relative occupational distribution of minorities between 1960 and 1989. Table 1 expresses, in ratio form, the extent to which black and white employees are represented in each occupational classification.[14] Because the table is based on the premise that "fairness" in the distribution of jobs is relative, it measures the distribution of Blacks in various occupations against that of Whites.[15] For example, if 5% of all black and 10% of all white employees are in the "officials and managers" category, the ratio will be 50 (5/10=.5 x 100). If 6% of all black and 3% of all white employees are laborers, the ratio will be 200 (6/3 = 2 x 100). Although the table is crude for several reasons,[16] it does

12. 110 CONG. REC. 6547-49 (1964)(statement of Sen. Humphrey).

13. The contribution of law to improved employment opportunity is discussed in Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI. KENT L. REV. 1, 7-12 (1987), and Blumrosen, *The Law Transmission System & The Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL. L.J. 313 (1984).

14. Table 1 is taken in part from Blumrosen, *The Law Transmission & the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL. L.J. 313, 335 (1984). The figures for 1983 and 1989 are derived from BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, 31 EMPL. & EARNINGS 183 (Jan. 1984); BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, 37 EMPL. & EARNINGS 183 (Jan. 1990).

15. Although this approach automatically includes changes in the overall mix of employees in the economy, it accounts only for the distribution of employed persons. It does not account for differing unemployment rates.

16. These principles operate on a high level of abstraction, where occupational categories are defined broadly. Moreover, the principles do not have the same persuasive

establish the general parameters of the improvement in black occupational distribution since the enactment of the Civil Rights Act of 1964.

Table 1. Ratio of Black Worker Employment to Non-Hispanic White Worker Employment, by Occupational Category, 1960-1989

Occupation	1960	1970	1980	1983[17]	1989[18]
Off. & Mgr[19]	21.5	30.7	43.3	46.0	51.2
Prof. & Tech.[20]	36.7	61.5	77.0	71.25	64.7
Sales	22.2	31.3	42.6	47.2	58.5
Clerical[21]	46.2	73.3	98.9	103.4	112.0
Craft workers[22]	43.0	60.0	72.2	71.8	82.9
Operatives[23]	113.5	139.4	143.7	160.2	160.0
Laborers[24]	306.0	251.2	160.5	182.0	186.0
Service[25]	213.4	194.6	176.1	186.2	192.0

Table I demonstrates that Blacks occupy an increasing relative proportion of official, managerial, sales, clerical and craft worker positions, and a decreasing relative proportion of jobs as operatives and laborers. This change is not merely a statistical abstraction, but represents increased access for a large number of Blacks to jobs with

---

power with respect to smaller occupational categories or to the employment patterns of particular employers. *See, e.g.*, Culp, *A New Employment Policy for the 1980's: Learning from the Victories and Defeats of Twenty Years of Title VII*, 37 RUTGERS L. REV. 895 (1985).

Adopting this general approach does not imply either that all of the disparity is the result of discrimination or that the only corrective for the disparity is the adoption of an illicit quota system. Non-quota techniques, ranging from improved recruiting to legitimate affirmative action, can improve opportunities for minorities and women in a lawful way. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979); Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616; Legal Aid Soc'y v. Brennan, 608 F.2d 1319 (9th Cir. 1979) *cert. denied*, 447 U.S. 921 (1980).

Finally, the 1983 and 1989 statistics are not fully compatible with the earlier figures because the Bureau of the Census changed the methods of classifying workers for the 1980 census. The data to 1980 covers "Black and other races," while the post-1980 data compares black occupational distribution to non-Hispanic whites. (Nearly 98% of Hispanics classify themselves as Whites.) Charting the change in Hispanic worker ratios gives a roughly similar picture. *See* the discussion of problems in historical continuity in BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 2307 (1988).

17. *See* note 16, third paragraph.
18. *See id.*
19. Officials and managers. After 1980, executives.
20. Professional and technical. After 1980, professional specialty, technicians and related support.
21. After 1980, administrative support, including clerical.
22. Skilled workers. After 1980, precision production, craft and repair.
23. Semi-skilled workers. After 1980, operators and fabricators.
24. After 1980, handlers, equipment cleaners, helpers and laborers.
25. Service occupations, excluding household and protective.

higher pay, greater dignity, and greater opportunity for advancement. Under the assumptions of the 1960s, this improvement in occupational distribution should have generated equivalent improvement in relative wages and relative unemployment levels.

In fact, it did not. In a 1988 report, the Center for Budget and Policy Priorities noted that the typical black family's 1987 income equalled 56.1% of the typical white family's income, a greater disparity than in any year during the period from 1969 to 1981.[26] In addition, black unemployment rates continue to more than double white rates. According to the report, the black unemployment rate was 2.45 times the white rate in 1987 and 2.57 times the white rate for the first eight months of 1988. Moreover, while the overall black unemployment rate in 1987 remained close to its 1978 level, there were 100,000 more long-term unemployed black workers in 1987 than in 1978.[27]

Changes in demographics and employment structure, which were unanticipated in 1964, largely explain why wage and employment improvements did not follow improvement in occupational distribution. For example, birth rates among minorities in the 1960s and early 1970s exceeded white rates, increasing the relative proportion of the minority population that reached working age in the 1980s. As a result, though the proportion of jobs held by minorities (compared to Whites) increased, because the proportional increase in employment did not match the proportional increase in population, the black unemployment level remained relatively constant. Policy makers in the 1960s had not considered the demographic consequences of higher relative minority birthrates. Birth control policies were not part of the civil rights agenda. In fact, some civil rights advocates viewed family planning as "a conspiratorial move by the dominant culture to limit the population growth of African Americans. . . ."[28] Furthermore, lowered labor force participation rates among black men had not been anticipated.[29]

Deeper changes in the national economy offer an additional explanation for why the improved occupational position of Blacks[30] did not significantly improve relative black income. Between 1979

26. CENTER FOR BUDGET AND POLICY PRIORITIES, STILL FAR FROM THE DREAM: RECENT DEVELOPMENTS IN BLACK INCOME, EMPLOYMENT AND POVERTY 17 (1988).

27. *Id.* at 30-31.

28. *See* McMurray, *Those of A Broader Vision: An African-American Perspective on Teenage Pregnancy and Parenting*, in THE STATE OF BLACK AMERICA 1990, *supra* note 9, at 205-06.

29. *See Common Destiny, supra* note 3, at 306-12.

30. *See id.* at 294-98.

and 1988, many higher-paying production jobs in the steel, automobile, petro-chemical, electrical, and machine industries (some of which had employed large numbers of minorities) were shifted overseas to low wage foreign countries.[31] During the same period, employment opportunities expanded most rapidly in the service industry,[32] where jobs typically paid low wages.[33] The loss of thousands of higher paying jobs forced minorities, like Whites, to settle for lower paying work in the service industries.[34]

These shifts in the productive processes disproportionately hurt minority families. As wages for blue-collar workers declined in the 1980s, families increasingly needed two wage earners to maintain the standard of living provided by a single wage earner in the 1970s. But because 42% of minority families are headed by women (compared to 13% of white families), minority families have been more likely to experience a decrease in their standard of living.[35] This problem is exacerbated by the fact that minority women who head families work in a labor market where occupational segregation still depresses wages in traditionally "female" jobs.[36] While half a million women entered highly visible, previously male, jobs between 1970 and 1985, 3.3 million women entered traditionally female jobs, earning, on the average, 65% of the wages paid traditionally male jobs in the same occupational category.[37]

---

31. *See* Shaiken, *Globalization and the World Wide Division of Labor,* MONTHLY LAB. REV., Feb. 1986, at 27; Alic & Harris, *Employment Lessons From the Electronics Industry,* MONTHLY LAB. REV., Aug. 1987, at 47.

32. *Id.* at 310-12.

33. The average hourly wage in March 1989 was $17.21 in goods-producing industries and $13.12 in the service-producing sector of the economy. In the goods-producing sector, the wage was $18.43 in durable goods and $15.33 in non-durable goods. White collar workers averaged $16.57, blue collar workers $14.35, and service workers $7.16. Union workers averaged $18.25, and non union workers averaged $13.48. Daily Lab. Rep. (BNA) No. 115, at B-5 (June 16, 1989).

34. The expanding industries of the 1980s involved large numbers of lower paying jobs in retail, business, and health services. R. COSTRELL, THE EFFECTS OF INDUSTRY EMPLOYMENT SHIFTS ON WAGE GROWTH: 1948-1987, at 1 (1988)(study prepared for the Joint Economic Committee).

35. Fifty eight percent of all women maintaining families are white, 29% are black and 10% are Hispanic. The median yearly income of all female single heads of households is only $14,620, compared to $24,804 for male single heads of households. The median yearly income of black women who head households is only $9,710; for Hispanic women, it is $9,805. WOMEN EMPLOYED INSTITUTE, OCCUPATIONAL SEGREGATION: UNDERSTANDING THE ECONOMIC CRISIS FOR WOMEN 2 (1988) [hereinafter, WOMEN EMPLOYED REPORT].

36. *See* R. Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964,* 12 U. MICH. J.L. REF. 397 (1979); R. Blumrosen, *Remedies for Wage Discrimination,* 20 U. MICH J.L. REF. 99 (1986).

37. WOMEN EMPLOYED REPORT, *supra* note 35, at 3. The report explained "In every occupational category, jobs held mostly by women workers generally pay less than jobs

Thus, though occupational distribution has improved since 1964, modifying the shared understanding of the "place" of minorities in society, demographic and economic changes prevented this redistribution from triggering improvements in relative minority income and unemployment rates.[38] As a result, Title VII has not produced the employment opportunities its creators anticipated.

III. A Proposed Legislative Agenda

Defining an expanded civil rights agenda is not easy. The experience of the 1970s and 1980s, however, demonstrates the importance of an expanded agenda if the movement is to attain its traditional goals under contemporary social and economic conditions. Both the flux of new developments and our inadequate understanding of their synergy preclude any definitive listing or single approach. Nonetheless, the relation between social and economic reality and traditional movement issues should inform this new agenda. My aim is not to set the exact parameters of a new agenda, but to suggest that civil rights advocates should be sensitive to the potential impact of social and economic change.

What follows is a list of matters that should be included on an expanded civil rights agenda because they affect employment opportunities. The list consists of three parts: specific proposed national policies, general economic policies, and "traditional" civil rights issues that have enhanced importance because of current conditions. These particular selections and the implied policy choices are, of course, debatable; the point is that matters of this type should be integrated into the civil rights agenda.

A. Specific national policies

1. Restructuring America after the Cold War: the peace dividend. The anticipated reduction in defense production and the size

held mostly be men. In occupations which are female-dominated, median weekly salaries range from a low of $92 for child care workers in private households to a high of $480 for registered nurses. In occupations which are male-dominated, median weekly salaries range from a low of $291 for garbage collectors to a high of $803 for marketing, advertising, and public relations managers." *Id.* at 6.

38. This conclusion is not at odds with my perception of the importance of the role of law as compared with "economics" in opening employment opportunity. *See* Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, *supra* note 13. My point here is that a body of law aimed at changing the behavior of employers cannot influence events beyond their control, such as the shift from a production to a service economy. For a discussion of how economic changes could affect Title VII law, see Norton, *The End of the Griggs Economy: Doctrinal Adjustment for the Now American Workplace*, 8 YALE L. & POL'Y REV. 197 (1990).

and deployment of U.S. military forces will reduce opportunities for minorities and women in the armed services and will create a need for their reintegration into civilian life. In 1986, Blacks constituted 12.8% of the lowest three U.S. Army officer categories and 30.5% of the sergeants.[39] At the ranks below sergeant, Blacks constituted 24.6% of personnel.[40] The reduction of personnel at these ranks will eliminate one avenue for minority training and education.[41] In addition, depending on local conditions near particular military bases, the choice of bases and facilities to close or deactivate may have a differential impact on minority employment and business opportunities. The highly political debate on military restructuring should include the implications for minority and female employment.

This is not to suggest that the civil rights movement should oppose demilitarization—far from it. The movement, however, like other interested groups, should contribute to the demilitarization debate. At a minimum, the federal government should make conscious efforts at placement, including a stepped-up Title VII and Executive Order program, to assure that minorities and women who lose jobs find comparable places in civilian activities. These programs should include safeguards to assure that layoffs do not have a discriminatory impact and to encourage contractors with employment opportunities to employ personnel laid off by other contractors.

2. Leapfrogging the suburbs—a proposal concerning jobs and housing. Minority youth who live in urban ghetto housing projects lack the contacts and opportunities that those living elsewhere use to obtain steady, well-paying employment.[42] The educational opportunities of these youths are also limited.[43] One writer has suggested that the problems of urban minorities are exacerbated by the

39. COMMON DESTINY, *supra* note 3, at 73.

40. *Id.*

41. The reduction in defense production and research will also affect employment opportunities for minorities and women in civilian employment. Under Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000(e) (1982), and its implementing regulations, 41 C.F.R. § 60-2 (1988), most government contractors are required to have affirmative action programs to assure equal employment opportunity for minorities and women. Between 1974 and 1980, the pressures generated by these requirements produced greater improvement in employment of minorities among contractors than among noncontractors. *See* H. HAMMERMAN, A DECADE OF NEW OPPORTUNITY: AFFIRMATIVE ACTION IN THE 1970s, at 42-44 (The Potomac Institute, 1984).

42. *See* COMMON DESTINY, *supra* note 3, at 319-23, 49-51 (summary of phenomenon) and 88-91 (extent of residential segregation in U.S.).

43. *See generally*, COMMON DESTINY, *supra* note 3, at 331-79.

> serious mismatch between the current educational distribution of minority residents in large northern cities and the changing educational requirements of their rapidly transforming industrial bases. This mismatch is one major reason why unemployment rates and labor force dropout rates among central-city blacks are much higher than those of central-city white residents, and why black unemployment rates have not responded well to economic recovery in many northern cities.[44]

This "mismatch" is the disparity between the skill and education level required by jobs located in the central cities and the level of preparation of the minority labor force. In contrast, "essentially all of the national growth in entry-level and other jobs with low educational requisites has occurred in the suburbs, exurbs, and nonmetropolitan areas, all of which are far removed from growing concentrations of poorly educated minorities." [45]

This analysis suggests that the twin problems of high minority unemployment and social decay in the inner cities may be alleviated if impoverished minorities trapped in the urban ghettos were helped to live elsewhere, through public or publicly-assisted housing located beyond the central city/ suburban area. Much of the housing in the cities where minorities live a segregated life is public housing,[46] which need not be built solely in the inner cities. Land and building costs in exurbia would be lower, employment opportunities comparable, and commuting to employment in the suburbs as feasible.

Providing mobility to the poor, however—allowing those who wish to do so to "leap frog" out of the decay and social disaster of the city—is not yet part of the current civil rights agenda.[47] In part, this may be due to a belief that thinning the minority population in the central cities will dilute minority political strength.[48] Whether a

---

44. Kasarda, *Jobs, Migration and Emerging Urban Mismatches,* in URBAN CHANGE AND POVERTY 148, 180-83 (McGeary & Lynn, eds. 1988).

45. *Id.* at 192.

46. *See, e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 929 (2d Cir. 1988)("a disproportionately large percentage of families in existing subsidized projects are minority"), *aff'd* 488 U.S. 15 (1988).

47. *See Committee Report, Committee on National Urban Policy,* in URBAN CHANGE AND POVERTY, 52 (McGeary & Lynn, eds. 1988). Kasarda, *supra* note 44, at 193, suggests several strategies for facilitating mobility for the urban disadvantaged which include improving job search capability, relocation assistance, enforcement of fair housing and employment laws, pooled transportation to suburban jobs and reshaping public assistance laws so that they do not anchor those with limited resources to distressed areas. He does not advocate building low income housing in exurbia.

48. *See* COMMON DESTINY, *supra* note 3, at 230-41. In the central cities, minorities became an increasingly large proportion of residents between 1975 and 1985. In the Northeast, they rose from 33% to 42%, in the Midwest from 28% to 35%, in the South from 40% to 45%, and in the West from 33% to 39%. Kasarda, *supra* note 44, at 157.

leapfrogging plan will dilute the local political influence of Blacks and other minorities will depend on the population mix, political attitudes, and structure of the election process in each individual city. In fact, the presence of minorities in exurbia may expand the political influence of those concerned with equal opportunity. Although leapfrogging creates a host of problems, it does question the assumption that available resources should be directed into the central cities, which contain our worst problems. If political forces in both the cities and the suburban ring shared the view that additional public housing should be available in what are now lightly populated areas, and if some of those in public housing were interested in moving, the idea of leapfrogging might be viable.

3. Criminal law enforcement. In the 1930s and 1940s, when racial lynchings occurred, demands for more vigorous law enforcement on behalf of Blacks were central to the civil rights effort. Since the 1960s, however, increased concern with police brutality has overshadowed this element of the traditional agenda. Blacks nevertheless continue to be victims of violent death, injuries and property losses by criminal actions more often than Whites,[49] for which the lack of police protection is a contributing factor. The civil rights movement should therefore examine the allocation of police resources in relation to the risk of criminal activity in order to encourage greater police protection for minorities.

B. General Economic Policies

1. Mergers and acquisitions. The increased debt that financed last decade's merger and acquisition frenzy has reduced employment among larger corporations,[50] which may work against the continued inclusion of minorities and women. Recently-hired minorities and women, like recently-hired white males, are more likely to be discharged in a reorganization. If an employer has not had a long history of employing minorities and women, its use of a "length of service" principle in layoff decisions will reduce the proportion of minorities who remain employed.[51]

Coalition building, voter energizing and charismatic leadership can build election success based on such changes.

49. COMMON DESTINY, *supra* note 3, at 464.

50. According to Lacey & Co., a New York consulting firm that monitors workplace trends, about 110,000 permanent staff cuts were announced by major U.S. corporations in the first three months of 1990. *Corporations Cut 110,000 Jobs This Year; Part of Long-Term Trend, Consultant Says*, Daily Lab. Rep. (BNA) No. 67, at A-15 (Apr. 6, 1990).

51. The Supreme Court has held that the "bona fide seniority system" provision of Title VII protects seniority systems which have a disparate impact on minorities and

Similarly, heightened competition could force employers to judge which employees will "fit" into the business environment, which could also restrict minority and female opportunity. There is substantial evidence that traditional racial and gender stereotypes continue to influence managerial behavior: women are not "really" interested in intense competition; minorities do not respond quickly enough; older workers lack "flexibility.[52] Individual corporate decisions can be reviewed under Title VII;[53] the increase in corporate debt because of a merger or acquisition process cannot. The civil rights movement should examine the consequences of corporate reorganization for the employment of minority, female, and older workers, and contribute to the Congressional policies concerning that process.

2. *Trade with low wage countries.* The transfer of jobs to low wage countries has influenced the opportunity structure for minorities, particularly those with lower skill levels. The United States' present "free trade" stance has effectively reduced American wages, with the impact falling most heavily on the large number of minority workers whose economic situation is marginal. *A Common Destiny* notes that, "[a] generation ago a low-skilled man had relatively abundant opportunity to obtain a blue-collar job with a wage adequate to support a family at a lower middle class level or better." In contrast, "[t]oday the jobs available to such men—and women—are often below or just barely above the official poverty line for a family of four."[54] This shift underscores the need for policies that will enable relatively uneducated and unskilled persons to earn enough to

---

women unless there is a showing of intent to discriminate. Teamsters v. United States, 431 U.S. 324 (1977). The question of whether the "bona fide seniority" proviso protects unilateral employer-established seniority systems has not been explicitly decided by the Supreme Court. *See* Blumrosen & Blumrosen, *The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Times,* 28 RUTGERS L. REV. 1082 (1975); Blumrosen & Culp, *Reducing the Work Week to Expand Employment: A Survey of Industrial Response,* 9 EMPLOYEE REL. L. J. 393 (1983-84).

52. Professor Marley S. Weiss suggests that discrimination against blacks and older workers may influence plant closure and site selection as well. Weiss, *Risky Business: Age and Race Discrimination in Capital Redeployment Decisions,* 48 MD. L. REV. 901, 913 (1989). Professor Weiss notes that the EEOC has abandoned a 1971 proposal to interpret Title VII disparate impact theory to create a prima facie case whenever a company relocates from the inner city to a suburban area containing a lower percentage of minorities in the workforce, or whenever the transfer of operations affects minorities among incumbent employees more adversely than white incumbents. *Id.* at 921-22, n.87.

53. *See* Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

54. COMMON DESTINY, *supra* note 3, at 7-8.

sustain a middle class standard of living.[55] Such policies would include modifying trade policies that allow low wage countries to drive down the wages paid American workers. For example, new tariff policies that reward trading partners who improve the wage position of their own workers would simultaneously assist foreign workers and reduce the depressive effect on American wages. The 1984 amendments to the tariff act, which encourage developing nations to take steps "to afford internationally recognized worker rights to workers in the country," are a step in this direction.[56] Likewise, the anti-apartheid sanctions legislation[57] can be viewed as an expression of U.S. concern for abusive labor conditions in South Africa. Maintaining decent labor conditions in the United States would seem to justify specialized tariff policies, although some in the civil rights community may hesitate to intrude on capital formation policies in countries that have large populations of people of color.

The traditional antagonism between the labor and civil rights movements has also contributed to the civil rights community's silence on issues of trade policy and wages, traditionally viewed as "union issues." At least part of the union movement, however, has demonstrated a willingness to participate fully in equal opportunity programs. Because both movements are in a precarious position, the relation of the two should be reexamined. For example, if a larger proportion of minorities is now entering service jobs, what are the prospects for improving the wages paid to service workers? Should the civil rights movement join the union movement in this

55. The current thrust toward improving educational levels as a way of competing in the global market, while commendable, will not help those who cannot take advantage of enhanced educational opportunities. It is ironic to emphasize worker training to enhance competitiveness while permitting a merger and acquisition process which saddles corporations with high debt costs which make them less competitive.

56. These rights include the right of association, the right to organize and bargain collectively, prohibitions on forced labor, a minimum age for employment of children and "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." 19 U.S.C. § 2462 (a)(4)(A)-(E). Under this provision, a country shall be ineligible for designation as beneficiary developing country "if such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country." 19 U.S.C. § 2462(b)(7). In determining whether or not to designate a country as a beneficiary developing country the president shall take into account steps taken to afford internationally recognized worker rights. 19 U.S.C. § 2462(c)(7).

The International Labor Rights Education and Research Fund, the AFL-CIO, nine international unions and several human rights organizations were expected to file suit March 29 alleging that federal officials have failed to enforce the workers' rights provision in granting duty-free trade status to developing nations. *Suit Charges Government With Violations of Workers' Rights Provisions of Trade Law,* Daily Lab. Rep. (BNA) No. 61, at A-14 (Mar. 29, 1990).

57. 22 U.S.C. §§ 5031-39 (1988).

effort? Should the civil rights movement increase pressure for an effective national full employment policy? However the questions are defined, civil rights groups should hammer out answers consciously, not reach them by default because they were not part of the traditional agenda.

3. Taxation of interest and capital gains. The civil rights movement has not taken an active role in recent tax reform legislation,[58] yet the unequal distribution of wealth across racial lines means that many tax programs disproportionately advantage white interests. The treatment of some types of interest as an income tax deduction makes the cost of borrowing money greater for those in the lower tax bracket (15%) than for those in the higher bracket (28%). After-tax interest costs are 85% of the interest for those in lower bracket, and 72% for those in the higher bracket.[59] If borrowers could treat a portion of the interest payment as a credit against tax owed, all could borrow at the same after-tax rate.[60]

The unequal distribution of wealth also has implications for capital gains tax proposals. In 1984, some 7% of white wealth, compared to less than 1% of black wealth, was in stocks and bonds. Ten percent of white wealth is in the form of business or professional firms or proprietorships, as compared to 6% of black wealth.[61] Since Blacks as a group are not as wealthy as Whites, the Bush Administration's proposal for a capital gains tax reduction on the sale of assets will disproportionately benefit Whites. Under these circumstances, the civil rights concern for increasing economic opportunities for historically-excluded groups does not appear to be served by a capital gains tax break.[62]

---

58. During debate on tax reform enacted in 1986, two influential black congressmen—Charles Rangel of Harlem and Parrenn Mitchell of Baltimore—were on opposite sides of the issue. Black interest groups did not play an active role on either side. *See* COMMON DESTINY, *supra* note 3, at 257.

59. For example, a $50,000 loan at 10% per year will cost a person in the 28% bracket $3,600; a $5000 deduction for interest payments will produce a $1400 tax savings. The same loan will cost a person in the 15% bracket $4,250; a $5000 deduction will produce a $750 deduction. Of course, those in the 33% tax bracket will have a savings of $1,666, so the loan will cost $3,333 per year.

60. This rate could be adjusted to avoid loss of revenue. Wealthy borrowers might still command a lower interest rate for reasons other than the tax consequence, but this is a matter beyond the scope of this paper.

61. *See* COMMON DESTINY, *supra* note 3, at 291-94.

62. A companion issue involves the provisions of bankruptcy laws. In the early 1980s, bankruptcy laws were amended in ways that made it more difficult for poor debtors to be released from their obligations. These amendments had a clear disparate impact on minorities and women, but were not addressed by the civil rights movement. *See* Blumrosen, *Expanding the Concept of Affirmative Action to Address Contemporary Conditions*, 13 N.Y.U. REV. L. & SOC. CHANGE 297, 312 (1985).

C. Aspects of the Traditional Agenda

1. Wage discrimination. Wage discrimination is an important component of a new civil rights agenda. Large numbers of women, especially minority women, remain in traditionally "female" jobs, which continue to command significantly lower wages than traditionally "male" jobs.[63] The women's movement has addressed this wage disparity, securing revisions in state and local government wage structures.[64] Because minority women head more than 40% of black families, the entire civil rights movement should actively support new federal legislation that would definitively characterize wage discrimination as an issue of sex discrimination actionable under Title VII.[65]

2. The "bottom line" issue. The "bottom line" issue arises when an employer uses an objective hiring criterion, such as a height or educational requirement, that has a disparate impact on minorities or women, but compensates for the disparate impact by hiring members of these groups so that the race and sex balance of the workplace mirrors that of the relevant applicant pool.[66] The legislative program of the 1990s should encourage employers to comply with equal employment policies by giving them "legal credit" for including minorities and women. This credit could either make it harder for plaintiffs to prove discrimination or easier for employers to defend against a "disparate impact" discrimination claim where they have a good "bottom line" concerning the jobs at issue.[67] Such an incentive for including minorities and women would supplement

63. *See* WOMEN EMPLOYED REPORT, *supra* note 35 and accompanying text.

64. NATIONAL COMMITTEE ON PAY EQUITY, SURVEY OF STATE GOVERNMENT LEVEL PAY EQUITY ACTIVITY, 1984-1988 (1988).

65. *See* R. Blumrosen, *supra* note 36. It is unlikely that the Supreme Court will be sympathetic to a consideration of this issue under existing law, given Justice Kennedy's decision while on the Ninth Circuit in Am. Fed. of State, County and Mun. Employees v. Wash., 770 F.2d 1401 (9th Cir. 1985). *See also* County of Wash. v. Gunther, 452 U.S. 161, 181 (1981) (5-4 decision) (Rehnquist, J. dissenting). Yet the proposed Civil Rights Act of 1990, H.R. 4000, 101st Cong., 2nd Sess. (1990) does not expressly address the issue.

66. The Supreme Court rejected the "bottom line" concept in Connecticut v. Teal, 457 U.S. 440 (1982), holding that discrimination, for purposes of disparate impact analysis, is measured by the effect of hiring standards at each point of the process, not merely at the bottom line. *But see* Blumrosen, *The Group Interest Concept, Employment Discrimination and Legislative Intent: The Fallacy of Connecticut v. Teal*, 20 HARV. J. LEGIS. 99 (1983); Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C.CENT. L. J. 1 (1981); Blumrosen, *The Bottom Line in Equal Employment Guidelines: Administering a Polycentric Problem*, 33 ADMIN. L. REV. 323 (1981).

67. This approach is de facto in effect now with respect to subjective employment criterion challenged under both disparate impact and disparate treatment theories. *See* Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.KENT L. REV. 1, 34-37 (1987).

government enforcement, which cannot be relied on alone even under the best of circumstances. Disparate impact would thus be measured at the "bottom line," rather than at each part of the process.

Civil rights proponents have objected to the bottom line concept on several grounds. They fear that employers will fail to compensate adequately for procedures with a disparate impact and will "cream" the available labor force. These proponents argue that procedures with a disparate impact should be generally proscribed because Title VII should protect the "weak" among minorities and women. These objections are invalid for several reasons. Employers should be able to "cream" the labor force and hire "strong" or "competent" minorities or women. If they discriminate against others later, they will violate Title VII at that time. Procedures with a disparate impact are problematic only when they restrict minority opportunity; otherwise, they should not be a matter of legal concern. Finally, equal opportunity laws are intended to protect all minorities, not only the weak. Title VII is a "rights" statute, not a welfare law. Restrictions on the opportunities of the most talented minorities do the most harm to minority interests.

3. The structure of employment opportunity laws. The mechanisms devised in the 1960s and 1970s to enforce the equal employment laws no longer effectively offer relief to Title VII plaintiffs. In 1964, the supporters of Title VII sought administrative hearing powers for the Equal Employment Opportunity Commission (EEOC) commensurate with those of the National Labor Relations Board. The compromise of 1964 denied the EEOC such powers, but permitted complainants to sue in federal court for equitable relief, including back pay. In addition, the law provided for the award of attorney's fees to encourage private counsel to litigate Title VII cases.[68] The notion of "private attorneys general"—individual counsel willing to litigate Title VII violations in the expectation of fees paid by respondents—was effective in the earlier years. In the 1980s, however, as litigating individual discrimination cases became increasingly complex, it became more difficult for complainants with meritorious cases to obtain counsel.[69] With the appointment of more conservative federal judges during the Reagan administration, plaintiffs' lawyers have become interested in expanding Title VII to include jury

68. In 1972, the EEOC was given the power to sue private employers for similar relief, and the Attorney General was allowed to sue state and local governments. 42 U.S.C. § 2000e-5(f) (1982).

69. *See* Blumrosen, *The Law Transmission System & The Southern Jurisprudence of Employment Discrimination*, 6 INDUS. & LAB. REL. REV. 313 (1984); Blumrosen, *Society in Tr[illegible]sition*

trials, and compensatory and punitive damages.[70] Where jurors are hostile to equality principles, however, a jury trial will not improve the civil rights plaintiff's chances of recovery.

The foregoing considerations suggest a revised structure for the equal employment laws that would enable them to function effectively. This structure would include:

(1) The continued option for plaintiffs to sue under Title VII as it now exists;

(2) A statute that would permit plaintiffs to seek actual and punitive damages with a jury trial right;[71] and

(3) An optional administrative hearing structure with a government attorney representing claimants.[72]

IV. The Proposal and Its Problems

The civil rights movement needs the organized capacity to analyze all legislative proposals and economic and social trends. This "research and alerting" component would identify and analyze the civil rights implications of non-civil rights problems and feed the analysis into policy-making and implementing processes. This function could be performed by the U.S. Civil Rights Commission if it is able to overcome the divisiveness of the 1980s. In the alternative, the role could be performed by a joint congressional committee or staff, by a small staff attached to a component of the civil rights movement, or by some umbrella entity or university. Perhaps existing institutions could play this role in a more active and publicized way, or, as Leroy Clark has suggested, revitalized public interest law

II: Price Waterhouse and the Individual Employment Discrimination Case, 42 RUTGERS L. REV.— (1990) (forthcoming).

70. There is a jury trial right under 42 U.S.C. § 1981 and under the Age Discrimination Act, but not under Title VII. A Rand Corporation study concluded that the prospect of punitive damages had considerable impact on employer practices under a now modified California common law rule concerning the discharge of employees. DERTOUZOS, HOLLAND & EBENER, THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION (Rand Corp., 1988). The proposed Civil Rights Act of 1990, H.R. 4000 and S.2104, 101st Cong., 2d Sess. § 8 (1990), would provide compensatory and punitive damages in some disparate treatment cases.

71. 42 U.S.C. § 1981 provides such a remedy, but does not cover sex discrimination and may not cover all religious and national origin discrimination. It has recently been narrowly construed to cover only the making of the employment contract, not its enforcement. *See* Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989).

72. This approach has recently been suggested by the Federal Court Study Committee. *See* FEDERAL COURTS STUDY COMMITTEE, TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT, Dec. 22, 1989. The well documented inadequacies of the EEOC as an investigating agency make it incapable, as currently organized and managed, of functioning in this new context. *See* U.S. GENERAL ACCOUNTING OFFICE, EEOC AND STATE AGENCIES DID NOT FULLY INVESTIGATE DISCRIMINATION CHARGES (Oct. 1988).

firms could perform part of this function.[73] Policy makers, as well as lawyers, should contribute to this process.

Critics have suggested that the issues addressed in Part III concern low and moderate income people generally, and that the civil rights movement cannot not embrace this set of issues without losing its character and diluting its energies.[74] The problems of minorities and women, however, have become increasingly identified with the low income component of society.[75] Thus, a concern for these issues may be essential to preserving the fruits of the traditional civil rights agenda.

The Citizens Commission, a bipartisan group of former federal officials, recognized this convergence in its final recommendation in *One Nation Indivisible*, emphasizing Headstart, Upward Bound, federal scholarships, child care and housing assistance as central to a civil rights effort.[76] The Commission concluded:

> . . .the legislation described above is not limited to any particular group of beneficiaries. It would extend assistance to economically disadvantaged white males as well as minorities, women and disabled people. At the same time, the relationship of measures of this kind to equality of opportunity should be apparent. . . .In these and other instances, some forms of basic assistance must be available to minorities, women and disabled people if they are to have access to the equal opportunities that the civil rights laws are designed to secure.[77]

---

73. Clark, *supra* note 9, at 844-45.

74. This concern was expressed vividly in an exchange between myself and Professor James Jones of the University of Wisconsin Law School during the 1984 Conference at Rutgers Law School, Newark, N.J. Papers and discussion appear in *1984: Twenty Years After the 1964 Civil Rights Act: What Needs to be Done to Achieve the Civil Rights Goals of the 1980s?* 37 RUTGERS L. REV. 667 (1985). Part of that exchange is as follows:

Blumrosen: The conditions of workers in foreign countries are now being used to leverage down the work conditions in the United States, thereby creating the conflicts and antagonisms about which we have been hearing so much.

How can the Civil Rights Movement address these problems? Where are our experts on tariff [and] trade?. . .But it seems to me that a program to utilize whatever economic resources we still have to improve the situation for workers overseas will also have some effect of reducing the downward pressures on us. . . .

Jones: I'm afraid that we're doing now at this conference what civil rights activists and participants have done for twenty years—losing focus. . . .But we now seem to have before us a program which is the agenda of the world—all of the spinoffs of whatever has happened in the last twenty years — political, international trade, etc. We are losing focus because: (a) we do not have the expertise to solve them, and (b) taking on these problems could only overburden us, *id.* at 864-65.

75. *See* COMMON DESTINY, *supra* note 3, at 294, which emphasizes how the macroeconomic performance of the nation influences black opportunities more intensely than white opportunities because of their greater marginality.

76. *See* ONE NATION, *supra* note 3, at 40-42.

77. *Id.* at 42.

The Commission thus recognized that equality principles are essentially procedural. If everyone is entitled to eat at the lunch counter, improving its food will benefit all who eat, not only those formerly excluded. This shift in philosophy—in which the civil rights laws become a reason to provide assistance to disadvantaged people—reflects the underlying shift in the nature of the problems confronting many minorities and women. The constructive consequence of the Civil Rights Act of 1964 is thus that the civil rights movement must address the political and economic problems of the general society in addition to—but not as a substitute for—the issues addressed by the traditional agenda.